Supreme Court, U.S.
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No. 93-148

In the Supreme Court of the United States

OCTOBER TERM, 1993

CRAIG WINES OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in sentencing petitioner on the basis of the number of marijuana plants involved in his offense rather than the weight of the consumable marijuana those plants might have produced.

2. Whether the court of appeals properly determined that the government did not violate its plea agreement with petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is unpublished, but the judgment is noted at 989 F.2d 501 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1993. A petition for rehearing was denied on April 21, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on July 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Western District of Michigan to manufacturing marijuana, in violation of 21 U.S.C. 841, petitioner was sentenced to 150 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay a $30,000 fine. The court of appeals affirmed.

1. On September 18, 1990, narcotics officers obtained and executed a search warrant for petitioner's garage. Pet. App. 4a. During that search, the agents discovered 509 bundled marijuana plants hanging from the garage's rafters. Petitioner was subsequently arrested and charged in a two-count indictment with manufacturing marijuana from April 1, 1989, through September 18, 1990, and conspiring to distribute marijuana. *Ibid.*

Petitioner pleaded guilty to one count of manufacturing marijuana. Pet. App. 4a. In the written plea agreement, the government and petitioner entered into three stipulations. First, they agreed that the marijuana seized from petitioner's garage "represented the product of at least *100 marijuana plants* but in no case more [than] *509 marijuana plants*." C.A. App. 97. In qualifying that stipulation, petitioner reserved "the right to present evidence and argument" that there were fewer than 509 plants in his garage and that "the total number of plants to be considered by the court under [petitioner's] relevant conduct [was] less than *700 plants*." *Ibid.* The government reserved the right "to present argument and evidence as to these issues." *Ibid.* The parties also agreed that "the readily provable relevant conduct of

[petitioner did] not exceed *700* plants for this offense, inclusive of the *509* plants discussed above." *Ibid.*

Second, the parties stipulated that the government would recommend a two-level reduction for acceptance of responsibility if petitioner refrained from additional criminal activity and fully cooperated with the probation officer in preparing the presentence report. C.A. App. 97-98. Finally, the parties stipulated that, based upon the known evidence, petitioner "was not an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive as discussed in [Sentencing Guidelines] § 3B1.1(a)." *Id.* at 98. Each party once again reserved "the right to present evidence and/or argument as to [petitioner's] leadership role or lack thereof * * * other [than] as indicated in § 3B1.1(a)." *Ibid.*

Additionally, petitioner acknowledged that he was subject to sentencing under the Sentencing Guidelines and that the government would fully apprise the district court and probation office of "the nature, scope and extent of [petitioner's] conduct regarding the charges against him, including matters of aggravation and mitigation relevant to the issue of sentencing." C.A. App. 96, 98-99. Both parties also acknowledged explicitly that the plea agreement was "advisory" only and was not binding on the district court. *Id.* at 99.

2. Petitioner entered his guilty plea on February 12, 1992. Because the plea agreement did not specify the number of marijuana plants that petitioner had possessed, the district court held an evidentiary hearing to determine that number for sentencing purposes.

At that hearing, two state police officers described finding the marijuana plants hanging from the rafters of petitioner's garage and discussed the overall physical condition of the plants. See Evid. Hrg. Tr. 5-83. The detective who had counted the bundled plants testified that he had counted 509 plants. *Id.* at 76. Two of petitioner's associates also testified at the hearing, describing the marijuana growing and harvesting process. *Id.* at 85-167. One associate estimated that petitioner's 1989 marijuana crop (*i.e.*, the harvest prior to the one found hanging in petitioner's garage) had included between "800 and 1,200 plants," which would yield a total of between 30 and 40 pounds of salable marijuana.[1] *Id.* at 93, 103-104. The other, although unable to give an estimate of the number of plants grown in 1989, testified that on the basis of the portion of the crop that he saw, the usable marijuana yield would have been "[a]pproximately ten pounds." *Id.* at 163. Petitioner presented the affidavit of an expert witness who viewed videotaped and still photographs of the marijuana seized from petitioner and concluded that at least some of the bundles contained only branches, rather than full plants. C.A. App. 103-104.

At the close of the evidentiary hearing the district court found that the seized 1990 harvest contained "at least 400 plants as plants are defined, that is, a rootball [with a] plant connected." Exc. Evid. Hrg. (Ruling) Tr. 5. The court concluded further that in the absence of evidence to contradict the testimony of

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[1] At the grand jury hearing, the witness had estimated the 1989 crop to include between 600 and 1000 marijuana plants. Gov't C.A. Br. 11 n.8.

petitioner's associates, the government had established that there had been 400 to 700 more marijuana plants in the 1989 harvest. *Id.* at 6.

3. The presentence report calculated petitioner's base offense level to be 32, based upon 1000 or more marijuana plants involved in petitioner's relevant conduct. Sentencing Guidelines § 2D1.1(c) & n.*. The report recommended a four-level enhancement for petitioner's role in the offense under Guidelines § 3B1.1(a), and denied petitioner credit for acceptance of responsibility on the ground that petitioner had manifested no contrition and had not cooperated in the preparation of the report, yielding a total offense level of 36. C.A. App. 23-26. After calculating petitioner's criminal history category to be II, the probation officer concluded that the Guidelines sentencing range should be 210 to 262 months' imprisonment. *Id.* at 28.

Petitioner filed a sentencing memorandum challenging the presentence report's recommendations. He argued that the number of plants should be below 500, that the upward adjustment pursuant to Section 3B1.1(a) was unjustified, and that his criminal history category should have been I. The government also filed a sentencing memorandum, recommending that the relevant number of plants for sentencing purposes should be "between seven hundred and one thousand." C.A. App. 336. Noting that "the number of individuals involved was not as clear at the time of the plea agreement as it was after the Evidentiary Hearing," the prosecutor urged a four-level enhancement under Guidelines § 3B1.1(a). C.A. App. 340. The prosecutor also refused to support petitioner's request for a downward departure based upon acceptance of

responsibility, because petitioner had not cooperated fully in the preparation of the presentence report. *Id.* at 340-341. The government did, however, concur in petitioner's contention that he fell within Criminal History Category I. *Id.* at 341-343.

At sentencing, the district court concluded that the proper quantity of marijuana for sentencing purposes was between 700 and 1000 plants. The court also made a two-level upward adjustment in petitioner's offense level based on petitioner's role in the offense, denied petitioner's motion for acceptance of responsibility, and granted petitioner's objection to his proposed criminal history category of II. The court's rulings resulted in an adjusted offense level of 32, a criminal history category of I, and a Guidelines sentencing range of 121-151 months. Pet. App. 5a n.1. The court sentenced petitioner to 150 months' incarceration.

4. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 3a-8a. The court rejected (*id.* at 5a-6a) petitioner's claim that the government violated the plea agreement by presenting witnesses who testified that the total number of marijuana plants exceeded 1000. The court noted that the government had reserved in the agreement "the right to present argument and evidence proving that the total number of plants exceeded 700." Moreover, observing that the government had indicated in the plea agreement that it would "apprise the district court of 'the nature, scope and extent of [petitioner's] conduct' " and that petitioner had "assented to this provision," the court concluded that petitioner could not later "complain that the government's fulfillment of th[at] pledge violated the plea agreement." *Id.* at 6a.

The court recounted testimony from the government's witnesses and concluded that "[t]he district court evaluated the evidence and ruled conservatively in determining that [petitioner] had grown between 700 and 1000 marijuana plants during 1989 and 1990." Pet. App. 7a. Deferring to that factual conclusion, the court declined to consider petitioner's contention that the district court should not have calculated his sentence on a per-plant basis. *Ibid.* The court also found no error in the district court's refusal to grant petitioner a two-level reduction in his offense level for acceptance of responsibility (*ibid.*), held that the district court did not impermissibly double count the same criminal conduct (*id.* at 8a), and ruled that petitioner had failed to demonstrate that he was unable to pay the fine imposed by the district court (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 9-21) that he was improperly sentenced on the basis of the number of marijuana plants involved in his offense, rather than the dry weight of the usable marijuana produced by those plants. Petitioner argues (see Pet. 9-10) that the courts of appeals are in conflict on this issue both under the controlled substance sentencing statute (21 U.S.C. 841(b)(1)(A)(vii), 841(b)(1)(B)(vii)) and under Section 2D1.1 of the Sentencing Guidelines. If the district court correctly applied the Sentencing Guidelines, however, the minimum sentence under the applicable Guidelines range (see Pet. App. 5a & n.1) was greater than the 10-year mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1)(B)(vii), and the proper interpretation of the statutory provisions

is irrelevant to petitioner's case. The primary issue presented therefore involves only interpretation of Guidelines § 2D1.1(c), which provides that in the case of an offense involving 50 or more marijuana plants, the base offense level is to be calculated by treating each plant as equivalent to one kilogram of consumable marijuana.[2] Guidelines § 2D1.1(c) n.*.

The court of appeals declined to address that issue, Pet. App. 7a, and held only that the district court's factual determination of the number of plants involved in petitioner's conduct over the two years in question was not clearly erroneous. Even if that decision is viewed as an implicit rejection of petitioner's theory that his marijuana, having already been harvested, should have been evaluated only by weight, the court's judgment was correct on the facts of this case.

As several courts have noted, the establishment of per-plant sentencing equivalencies for cases involving plants rather than fully processed marijuana avoids disputes over the weight of consumable product that would be produced from unprocessed plants, and reflects a judgment that the large-scale cultivation and processing of marijuana is a more serious offense than distribution or possession of the processed drug. See, *e.g.*, *United States* v. *Holmes*, 961 F.2d 599, 601-602 (6th Cir.), cert. denied, 113 S. Ct. 232 (1992); *United States* v. *Osburn*, 955 F.2d 1500, 1506-1509 (11th Cir.), certs. denied, 113 S. Ct. 223 and 113 S. Ct.

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[2] The Guidelines derived their treatment of marijuana plants in cases involving more than 50 plants from the statutory provisions in 21 U.S.C. 841(b)(1). See Guidelines § 2D1.1, Application Note 10; Background. The sentence in this case resulted from application of the Guidelines, however, and it is their interpretation that is directly at issue.

290 (1992); *United States* v. *Webb*, 945 F.2d 967, 968-969 (7th Cir. 1991), cert. denied, 112 S. Ct. 1228 (1992); *United States* v. *Eves*, 932 F.2d 856, 859 (10th Cir.), cert. denied, 112 S. Ct. 236 (1991). On both rationales, it was appropriate for the district court to sentence petitioner based on the number of plants he produced.

First, although the marijuana plants in this case were no longer in the ground, they still retained the shape and structure of plants: the branches had generally not been removed from the stems (although the evidence was disputed on this point), and in any event individual leaves had not been removed from the branches. See, *e.g.*, Evid. Hrg. Tr. 70-71; C.A. App. 101-104. The plants had not been processed into easily quantifiable amounts of consumable marijuana. Second, petitioner pleaded guilty to manufacture of marijuana, not to possession or distribution; although he was charged with conspiracy to distribute the drug, that charge was dismissed as part of the plea agreement. See Pet. App. 4a; Sent. Tr. 24. In the context of sentencing for a cultivation offense, it was appropriate for the court to determine the Guidelines sentencing range based on the per-plant provisions of Section 2D1.1. See *United States* v. *Haynes*, 969 F.2d 569, 572 (7th Cir. 1992) (distinguishing cultivation and harvesting from post-processing activities); *United States* v. *Curry*, 977 F.2d 1042, 1060 n.18 (7th Cir. 1992), cert. denied, 113 S. Ct. 1357 (1993).

Contrary to petitioner's contentions (see Pet. 19-20), the district court's decision to evaluate the marijuana seized from petitioner on a per-plant basis does not conflict with decisions of other courts of appeals. To begin with, the cases petitioner cites (Pet. 11) on the question of when a new seedling or

cutting becomes a "plant" for sentencing purposes are largely irrelevant to this case. That courts may look to the development of root structure to determine when a seedling has become mature enough to be considered a "plant" sheds little light on the very different question, presented here, of whether fully grown plants must be treated differently under the Guidelines simply because they are discovered and seized shortly after rather than shortly before being harvested.

The cases petitioner cites that do address that issue (see Pet. 11-14) do not establish a conflict in the circuits. *United States* v. *Corley*, 909 F.2d 359, 360-361 (9th Cir. 1990), approved a district judge's decision to impose sentence on the basis of 500 seized marijuana plants, while ignoring both 800 "seedlings" and additional quantities of dried, separated "shake" leaves. The court rejected the defendant's position that he should have been sentenced on the basis of the "potential yield" of consumable marijuana from his plants, finding a per-plant focus appropriate in light of the difference in weight between live plants and dry leaves and the difficulty of determining the actual amount of usable marijuana that any given plant would have produced. While the court drew a broad distinction between live marijuana plants and "marijuana leaves [that] have been dried," 909 F.2d at 361, there is no indication that the court considered the intermediate situation presented by this case. The court's rationales for upholding use of a per-plant measure are consistent with a case such as this one, where whole plants were seized after harvest and during the drying process. There is therefore no reason to assume that the *Corley* court would have

disagreed with the district court's ruling in this case.[3]

Similarly, the decision in *United States* v. *Bradley*, 905 F.2d 359, 361 (11th Cir. 1990) (per curiam), simply observes in dictum (citing the district court decision upheld in *Corley*) that weight is the proper measure for dry leaf (*i.e.*, semi-processed) marijuana, while holding that live plants are subject to per-plant sentencing computations. The same court of appeals in *United States* v. *Osburn*, 955 F.2d at 1509-1510, in considering a constitutional challenge to the validity of 21 U.S.C. 841(b), thought that it would present an "anomaly in the statutory scheme" if a marijuana grower faced a different sentencing regime depending upon whether he was apprehended just before or just after the harvest. Because that case involved only marijuana seized while it was still growing, however, see 955 F.2d at 1502, the court did not face such a situation, and did not, as petitioner states (Pet. 12), "hol[d] that harvested materials are not plants for guidelines purposes." Indeed, the court explicitly declined to address that issue in the abstract. 955 F.2d at 1509-1510.

Finally, the Second Circuit's decision in *United States* v. *Blume*, 967 F.2d 45, 49 (1992), also drew only a general distinction between "live" plants and "dry leaf" marijuana. *Blume* involved only plants that were seized while they were still growing, and the

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[3] Petitioner also cites (Pet. 12) the Ninth Circuit's opinion in *United States* v. *DeLeon* that is reported at 955 F.2d 1346 (1992). That opinion was withdrawn, however, and the final decision in the case reversed the defendant's conviction on other grounds and did not reach the sentencing question. *United States* v. *DeLeon*, 979 F.2d 761 (9th Cir. 1992).

district court's estimate of plants previously grown by the same defendants. The court therefore had no occasion to consider whether marijuana plants in harvested but unprocessed form should be evaluated by number or weight for purposes of Section 2D1.1, and its decision does not conflict with the district court's treatment of the drying plants seized from petitioner's garage in September 1990.

The court in *Blume* did hold, 967 F.2d at 49-50, that it was improper for the district court to base the part of its sentence that depended on an estimate of previous marijuana production on the estimated number of plants grown, rather than on the estimated dry weight of the finished marijuana produced over the life of the operation. That holding is in tension with the district court's decision in this case (see Pet. App. 5a) to compute petitioner's sentence in part on the basis of a finding as to the number of marijuana plants petitioner had produced during 1989. Any conflict between the decisions does not, however, require review by this Court. Any uncertainty that such a conflict indicates as to the proper interpretation of the Sentencing Guidelines in cases raising this narrow issue can be resolved by the Sentencing Commission in the discharge of its periodic duty to "review and revise" the Guidelines. 28 U.S.C. 994(*o*); *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

2. Petitioner contends (Pet 21-30) that the government violated the terms of his plea agreement, and that if the court of appeals had applied a more lenient standard of review it would have remanded his case for resentencing. See Pet. 29; Pet. App. 5a. Petitioner is correct in observing that there is some

disagreement among the courts of appeals over whether a claim that the government has breached a plea agreement must be raised before the district court if it is to be reviewed other than for plain error. Compare, *e.g.*, *United States* v. *Pryor*, 957 F.2d 478, 482 (7th Cir. 1992) (claim normally waived if not raised) with *Paradiso* v. *United States*, 689 F.2d 28, 30 (2d Cir. 1982) (per curiam) (claim normally not waived if not raised), cert. denied, 459 U.S. 1116 (1983).[4] Regardless of the standard of review applied in this case, however, the government did not violate the plea agreement.[5] The case therefore does not warrant review by this Court.

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[4] Not all of the cases petitioner cites on this issue support his argument. *United States* v. *Goldfaden*, 959 F.2d 1324, 1327 (5th Cir. 1992), for example, held that because the defendant had failed to raise his breach claim before the district court, it would be reviewed only for plain error—precisely the position adopted by the court of appeals in this case. Pet. App. 5a-6a.

[5] Petitioner's argument (Pet. 22-23) that a court must vacate a sentence in response to even a minor breach of a plea agreement is therefore not raised in this case. In any event, the cases cited by petitioner are inapposite. In each of them, the court found that the government had violated an important provision of the plea agreement. See *United States* v. *Valencia*, 985 F.2d 758 (5th Cir. 1993) (finding breach where government argued evidence concerning acceptance although plea agreement stipulated that acceptance credit should be given); *United States* v. *Canada*, 960 F.2d 263 (1st Cir. 1992) (finding breach where government argued for higher sentence than that stipulated in plea agreement); *United States* v. *Goldfaden*, 959 F.2d 1324 (5th Cir. 1992) (finding breach where government advocated specific Guidelines range even though plea agreement provided that government would make no sentencing recommendations); *United States* v. *Badaracco*, 954 F.2d 928 (3d Cir. 1992) (finding breach where government endorsed

Petitioner contends (Pet. 5) that the government breached the plea agreement when it permitted witnesses in the evidentiary hearing to testify that the total number of marijuana plants involved in the charged conduct exceeded 700. Petitioner further claims (Pet. 6) that the government compounded that breach when it argued in its sentencing memorandum that the district court should consider more than 700 plants for sentencing purposes. Finally, petitioner argues (*ibid.*) that the government breached the plea agreement when it argued in its sentencing memorandum that petitioner should receive the four-level enhancement under Section 3B1.1(a) and should be denied a reduction for acceptance of responsibility.

The plea agreement provided that petitioner's "readily provable" relevant conduct did not exceed "*700* plants for this offense, inclusive of the *509* plants discussed above." C.A. App. 97. In qualifying that stipulation, however, the government "reserve[d] the right to present argument and evidence as to these issues."[6] *Ibid.* Moreover, petitioner acknowledged that the government would apprise the district court and probation office of "the nature, scope and extent of

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presentence report's recommendation to provide enhancement for more than minimal planning although plea agreement stipulated that such planning was not involved); *United States* v. *Hayes*, 946 F.2d 230 (3d Cir. 1991) (finding breach where government argued for specific sentence although plea agreement stipulated that government would not recommend specific sentence).

[6] Petitioner similarly reserved "the right to present evidence and argument" that "the total number of plants to be considered by the court under [petitioner's] relevant conduct [was] less than *700 plants*." C.A. App. 97.

[petitioner's] conduct regarding the charges against him, including matters of aggravation and mitigation relevant to the issue of sentencing." C.A. App. 96, 98-99. When the court held its evidentiary hearing and the government presented witnesses regarding the number of marijuana plants, the government was merely following the express terms of the plea agreement, in which the government reserved the right to offer evidence that the number of plants was in fact greater than the number that was "readily provable." As the court of appeals found (Pet. App. 6a), the government's evidence that the total number of marijuana plants exceeded 700 "should not have been unexpected."

In argument at the end of the evidentiary hearing, the prosecutor argued only the "readily provable" number of plants specified in the agreement: he maintained that "the Government has met its burden because the total weight of the evidence shows by a preponderance that the number of plants is clearly at least between 400 and 700 plants during [petitioner's] relevant conduct." Evid. Hrg. Tr. 182. He then commented that "[w]hether it's more than that, we don't know," adding that the government would "leave that to the Court's discretion." *Ibid.* The prosecutor's argument did not violate the terms of the plea agreement.

Finally, the government did not breach the plea agreement either by refusing to support petitioner's motion for a downward departure based on acceptance of responsibility or by recommending a four-level enhancement based upon petitioner's role in the offense. The government agreed that it would support a downward departure only if petitioner "cooperate[d]

fully and truthfully with the probation office." C.A. App. 97-98. Because petitioner did *not* cooperate fully in the preparation of the presentence report and did not show contrition for having committed the offense, the government was entitled to refuse to support petitioner's motion for a downward departure. Pet. App. 7a; see C.A. App. 23-26 (presentence report). Similarly, the plea agreement provided that based upon the evidence "*now known*," petitioner "was not an organizer or leader of a criminal activity that involved five or more participants" (C.A. App. 98 (emphasis added)), but the government expressly "reserve[d] the right to present evidence and/or argument as to [petitioner's] leadership role." *Ibid.* Because "the number of individuals involved was not as clear at the time of the plea agreement as it was after the Evidentiary Hearing," the government after the hearing appropriately recommended a four-level enhancement under Section 3B1.1(a). C.A. App. 340. In any event, the court ultimately imposed only a two-level enhancement for petitioner's role in the offense, under Sentencing Guidelines § 3B1.1(c). Sent. Tr. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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